No. 83-388

In the Supreme Court of the United States

OCTOBER TERM, 1983

E-SYSTEMS, INC., AND LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND HOWARD R. CLYMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly applied the substantial evidence test in reversing an administrative denial of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B7), the opinion of the Benefits Review Board (Pet. App. C1-C11), and the opinion of the administrative law judge (Pet. App. D1-D18) are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1982. A petition for rehearing was denied on June 14, 1983 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on August 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1976, petitioner E-Systems, Inc., employed Howard Clymer as a heating and air-conditioning mechanic at its Sinai Field Mission in the Sinai Peninsula (Pet. App. B2, C2, D3). Clymer suffered no symptomatic medical problems when he began working for E-Systems and a pre-employment physical disclosed none (*id.* at B2, D3). Upon his arrival in Israel, Clymer performed very little heating and air-conditioning work; instead, he performed manual labor and construction work from 7:30 a.m. to 5 p.m. in the hot climate of the Sinai (*ibid.*).

Two months after he arrived in Israel, Clymer began experiencing physical difficulties (Pet. App. B2, D3). Over the next year and a half, he suffered episodes of exhaustion, nausea, numbness of the right arm and right side of the face, and intermittent headaches (*id.* at B2, C2, D3). In December 1976, he was hospitalized and diagnosed to be suffering from transient hypertension with possible cerebral ischemia (*id.* at C2, D3, D4). In January 1978, at the recommendation of E-Systems personnel, Clymer was again hospitalized, this time for 12 days (*id.* at B3, C2, D4).

The next month, at the direction of E-Systems, Clymer returned to the United States for medical evaluation and treatment (Pet. App. B3, C2, D4, D9, D11). His regular physician, Dr. John Dunn, diagnosed Clymer as suffering from disabling hypertension and diabetes mellitus (*id.* at B3, C2). Dr. Dunn concluded that work conditions, environment, and diet were contributing causes of these disabilities, and he advised Clymer not to return to work (*id.* at B3, B6, C2, D4). Dr. Robert L. North, who examined Clymer once, on April 26, 1979, 16 months after he had returned to the United States, agreed that Clymer had hypertension and diabetes, but could not ascertain the cause of these illnesses (*id.* at D6-D8). According to Dr. North, the conditions

could have been aggravated by dietary and environmental influences, but had not been caused by them (*id.* at B5, D6-D7).

2. In August 1978, Clymer filed a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. 1651 *et seq.* (Pet. App. B3, C2, D6, E1-E2). He alleged that the desert heat, stress of manual labor and the high-fat diet petitioner provided[1] resulted in "grave circulation disfunctions and a possible diabetic condition" (*id.* at E1-E2). After a hearing, the administrative law judge held that Clymer's claim was time-barred by the LHWCA's notice of injury provision and statute of limitations, 33 U.S.C. 912(a), 913(a) (Pet. App. D14-D15), and that, alternatively, Clymer's hypertension and diabetes mellitus "were not caused, triggered, aggravated or exacerbated by his employment or the work environment" (*id.* at D17). With one member dissenting, the Benefits Review Board affirmed, holding that substantial evidence supported the finding that Clymer's condition was not related to his employment (*id.* at C3).[2]

3. The court of appeals reversed in an unpublished opinion (Pet. App. B1-B8). The court concluded that the administrative law judge's finding that Clymer's condition had not been aggravated by his working conditions was not supported by substantial evidence (*id.* at B4-B5). The court observed that Dr. Dunn's opinion regarding the aggravation of Clymer's condition was uncontradicted inasmuch as Dr. North, upon whose testimony the administrative law judge had relied, also stated that such an aggravating effect

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[1]Clymer received cafeteria style meals from E-Systems while in its employ (Pet. App. D6).

[2]The Board did not decide whether the claim was time barred (Pet. App. C4).

was possible (*ibid.*). The court then held that there was no substantial evidence to support the administrative law judge's finding that Clymer knew or had reason to know that his injury was employment-related in December 1976 (*id.* at B6-B7). The court concluded that Clymer had no reason to suspect that his condition was work-related until April 1978, when he received Dr. Dunn's diagnosis (*ibid.*). Since Clymer had notified E-Systems of his claim in April 1978, and had filed his claim in August 1978, the court held that the claim was timely under both 33 U.S.C. 912(a) and 913(a) (Pet. App. B6-B7). Finally, because "[t]he [administrative law judge's] findings do not provide a sufficient basis for an evaluation of the extent of Clymer's disability claim," the court remanded the case for a determination of this factual issue (*ibid.*).

ARGUMENT

Petitioners' claim does not merit further review. The decision below does not conflict with any decision of this or any other court, and does not involve an important question of federal law requiring resolution by this Court. The decision of the court of appeals, in fact, does not even finally dispose of this matter; the court remanded the case for further findings on the issue of disability. Should petitioners be dissatisfied with the ultimate determination of the disability issue, they can seek appellate review at that time. There is, accordingly, no reason for this Court to depart from its usual practice of declining to review cases that have been remanded by the courts of appeals for further factual development. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893).

1. Petitioners' contention (Pet. 9-11) that the decision below conflicts with *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, Office of Workers' Compensation Programs*, 455 U.S. 608 (1982), is erroneous. Contrary to petitioners' assertion (Pet. 9), the court of appeals did not disregard the requirement (455 U.S. at 615) that an injury or illness must be caused by employment in order to come within the coverage of the Act. Rather, the court merely applied the well-established principle, not affected by this Court's holding in *U.S. Industries*, that aggravation of a preexisting condition can be an "injury" caused by employment. See, *e.g.*, *Bludworth Shipyard, Inc.* v. *Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983); *Volpe* v. *Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982); *Hensley* v. *Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 268 (D.C. Cir. 1981), cert. denied, 456 U.S. 904 (1982); *Gardner* v. *Director, Office of Workers' Compensation Programs*, 640 F.2d 1385, 1389 (1st Cir. 1981); *Cordero* v. *Triple A Machine Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979).[3] Thus, the court's examination of the record to determine whether substantial evidence existed to rebut the statutory presumption that Clymer's hypertension and diabetes were

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[3]Petitioners' reliance (Pet. 10) on *Southern Stevedoring Co.* v. *Henderson*, 175 F.2d 863 (5th Cir. 1949), to demonstrate that the Fifth Circuit has regularly ignored the causation requirement is unfounded. In that case the court found the employee's death compensable where it was hastened by the necessity of his climbing a ladder after suffering a heart attack. The court based its holding on the fact that the conditions of employment were the precipitating cause of death. 175 F.2d at 866. Indeed, in *Bludworth Shipyard, Inc.* v. *Lira*, 700 F.2d at 1049, the Fifth Circuit explicitly noted, citing *U.S. Industries*, that the words "arising out of," used in the definition of "injury," 33 U.S.C. 902(2), "instruct that the employment must have caused the injury." No review is necessary, therefore, to correct the Fifth Circuit's understanding of the law.

aggravated by his employment (33 U.S.C. 920(a)) did not conflict with *U.S. Industries*.[4]

2. Petitioners also contend (Pet. 11) that the court of appeals erroneously applied the statutory presumption of compensability (33 U.S.C. 920(a)) to an injury not actually claimed by Clymer. See *U.S. Industries*, 455 U.S. at 612-615. This contention is unpersuasive; the court of appeals did not apply the presumption "to a claim that was not fairly supported by the existing claim or by the evidentiary record" (*U.S. Industries*, 455 U.S. at 614 n.7).[5] Clymer's

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[4]Contrary to petitioners' assertion (Pet. 13), the court of appeals, in performing this substantial evidence review, did not "substitute[] its judgment for that of the fact finder." The court acknowledged the limited scope of its review (Pet. App. B4) and rested its conclusion on the uncontradicted evidence that Clymer's diet and work environment had aggravated his medical problems (*id.* at B4-B5). Because the court neither " 'misapprehended [n]or grossly misapplied' " the substantial evidence test, review of that factual question is not warranted. *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

Similarly, petitioners' claim (Pet. 14) that the court of appeals impermissibly reversed the administrative law judge's finding that Clymer had failed to prove disability does not merit review. The court did not disturb the finding that Clymer was not permanently and totally disabled, but instead remanded the case for a determination whether Clymer suffered total temporary, permanent partial or temporary partial disability. As the court explained (Pet. App. B7), "[t]he evidence of record points to the existence of a period of disability, however, we are unable to fathom how much or how long." The accuracy of this observation can hardly be denied since E-Systems terminated Clymer for medical reasons (Pet. App. D9). Thus, in remanding the case, the court of appeals neither contravened the findings supported by substantial evidence, nor impermissibly shifted the burden of showing the availability of work to the employer (Pet. 14).

[5]In *U.S. Industries*, the employee's claim recited only that his injury had occurred one day when he was lifting certain heavy objects at work. The administrative law judge found that this incident never occurred. The court of appeals thereafter erroneously created its own theory of recovery — that the employee suffered an injury at home in bed — and

claim plainly encompassed aggravation of a pre-existing condition. Clymer specified in his claim that "the destructive desert heat," "the stress of the labor" and a "high fat diet" resulted "in grave circulation disfunctions and a possible diabetic condition" (Pet. App. E2); petitioners' witness Dr. North testified without objection on cross-examination regarding the aggravation issue; and the administrative law judge addressed that theory in his decision (Pet. App. D16).[6] Unlike *U.S. Industries*, therefore, the court of appeals here did not create a theory of recovery unanticipated by the employer and not advanced by the claimant. Cf. *Champion* v. *S & M Traylor Brothers*, 690 F.2d 285, 296 (D.C. Cir. 1982) (statutory presumption of compensability applies where claim of causal connection was made before administrative law judge and court of appeals).

3. Petitioners finally assert (Pet. 15-16) that the court below erred in not sustaining the administrative law judge's determination (Pet. App. D15) that Clymer's claim was time barred because he should have been aware of a relationship between the injury and his employment on

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then applied the statutory presumption that the injury was work related. This Court held that "[e]ven if a claimant has an unfettered right to amend his claim to conform to the proof, the presumption by its terms cannot apply to a claim that has never been made." 455 U.S. at 613.

[6]Petitioners' argument (Pet. 11) that Clymer based his claim on "occupational illness," rather than aggravation of a pre-existing disorder, creates a distinction without a difference. Whether viewed as "an accidental injury" or "occupational disease," the injury here — symptomatic hypertension and diabetes — still arose out of employment if work conditions aggravated or precipitated the symptoms. And this is precisely the theory upon which Clymer based his case, through the testimony of Dr. Dunn and cross-examination of Dr. North. Aggravation of a pre-existing weakness may also be viewed as an occupational disease. See *Gardner* v. *Director, Office of Workers' Compensation Programs*, 640 F.2d 1385, 1389-1390 & n.3 (1st Cir. 1981); 1B Larson, *The Law of Workmen's Compensation* § 41.63 (1982).

December 7, 1976, when he was diagnosed to be suffering from intermittent labile hypertension. See 33 U.S.C. 912(a) and 913(a). But, as the court below noted (Pet. App. B7), Clymer had no reason to suspect his condition was employment-related until April 1978 when he received Dr. Dunn's diagnosis. The court did not, as petitioners assert (Pet. 15), create a rule of law that the statute of limitations does not begin to run until the employee is told by a doctor that his condition is employment related. It held only that there was no substantial evidence to support an earlier date in this case, a factual question that plainly does not require this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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